No. 99-1029

# In the Supreme Court of the United States

RENE M. DARBY, PETITIONER

*v.*

INGALLS SHIPBUILDING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION


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## QUESTIONS PRESENTED

1. Whether petitioner was entitled to an award of attorney's fees under Section 28 of the Longshore and Harbor Workers' Compensation Act for counsel's work during petitioner's appeal of an ALJ decision granting limited compensation benefits for his disability arising out of a 1987 injury, where petitioner did not obtain any additional compensation as a result of the appeal.

2. Whether the denial of a fee award under these circumstances violates equal protection or due process.

3. Whether the court of appeals properly denied petitioner leave to file a petition for en banc review of a non-dispositive order.

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*v.*

INGALLS SHIPBUILDING, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

## OPINIONS BELOW

The order of the court of appeals in No. 96-60029 denying petitioner's motion for an award of attorney's fees for proceedings before the court of appeals (Pet. App. A1), its order denying petitioner's motion for reconsideration (Pet. App. A2), and its order denying petitioner's motion for leave to file a petition for rehearing en banc of the court's denial of the motion for reconsideration (Pet. App. A3) are unreported. The order of the court of appeals in No. 99-60567, dismissing petitioner's petition for review of the Benefits Review Board's order denying an award of attorney's fees for proceedings before the Board (Pet. App. A4-A5), is unreported. The order of the Board, denying petitioner's motion for reconsideration of its order denying

attorney's fees (Pet. App. A68-A72), is unreported. The Board's order denying attorney's fees is unreported.[1]

**JURISDICTION**

The order of the court of appeals denying attorney's fees in No. 96-60029 was entered on June 11, 1999. The court of appeals' order denying reconsideration was entered on July 13, 1999, and the order denying leave to file a petition for en banc consideration was entered on August 19, 1999. The petition for a writ of certiorari was filed October 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

**STATEMENT**

1. The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, provides compensation to covered employees for work-related injuries that result in disability. 33 U.S.C. 908. Petitioner Rene M. Darby filed a claim for benefits under the LHWCA arising out of an injury he suffered to his neck and elbow in September 1987 while working as a

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[1] The May 24, 1999 order of the Board is reproduced in this brief at App., *infra*, 1a-3a.

[2] The order of the court of appeals dismissing the petition for review in No. 99-60567, entered on December 2, 1999 (Pet. App. A4-A5), which petitioner lists as a decision on review (Pet. 1), is not properly before this Court. Petitioner tendered a petition for a writ of certiorari on October 11, 1999 that was returned for failure to comply with the rules of this Court. Petitioner thereafter tendered a petition for a writ of certiorari that was placed on the docket on December 17, 1999 and deemed filed on October 11, 1999. The December 2, 1999 order was entered after the petition was deemed filed. Nevertheless, because the authority supporting the court of appeals' denial of attorney's fees and the Board's denial of attorney's fees is the same, the federal respondent will address both decisions.

joiner for respondent Ingalls Shipbuilding Corporation. Pet. App. A15, A17, A18. Respondent paid petitioner temporary total disability benefits while petitioner underwent medical treatment and eventually returned him to work in a modified joiner position in 1990. *Id.* at A8, A20, A68.

Petitioner sought additional compensation and medical benefits, claiming among other things that his post-injury position did not constitute suitable alternative employment. Pet. App. A9. In March 1992, after a hearing held in October 1991, an administrative law judge (ALJ) awarded petitioner additional medical benefits, temporary compensation benefits, and a scheduled award for the elbow injury under 33 U.S.C. 908(c)(1). Pet. App. A9, A68-A69. The ALJ, however, also ruled that petitioner's modified duty position was suitable alternative employment and therefore denied permanent total disability benefits. *Id.* at A9. Petitioner appealed to the Benefits Review Board, see 33 U.S.C. 921(b)(3), and the Board affirmed the ALJ's decision. Pet. App. A8.

2. Petitioner sought review of the Board's decision in the court of appeals. See 33 U.S.C. 921(c). The court affirmed the Board insofar as it upheld the ALJ's ruling that petitioner's modified duty position was suitable alternative employment. Pet. App. A9-A13, A69. The court of appeals also held, however, that the ALJ had failed to make a determination that petitioner's post-injury earnings fairly and reasonably represented his wage-earning capacity, see 33 U.S.C. 908(h), and therefore vacated the Board's decision and remanded to the ALJ for the limited purpose of making that finding. Pet. App. A13, A69.

3. On May 8, 1992, during the pendency of the foregoing proceedings, petitioner sustained a second em-

ployment-related injury while working in his modified joiner position. Pet. App. A16, A22, A46. After a period of light duty and voluntary compensation payments by respondent, petitioner filed a second claim for benefits in September 1996 based on the May 1992 injury. *Id.* at A15, A23-A24.

4. The ALJ held another hearing in December 1997. The ALJ had before him the remanded issue regarding the 1987 injury and a new claim stemming from the 1992 injury. The ALJ consolidated the remanded issue with the second claim, noting that the remanded issue was a "relatively minor issue" for which separate proceedings were unnecessary. Pet. App. A40. The ALJ ruled against petitioner on the remanded issue and found that petitioner's actual earnings in the modified duty position reasonably and fairly represented his wage-earning capacity during 1990-1991, when he occupied that position. *Id.* at A17, A40-A44. Accordingly, the ALJ awarded no further relief on the original claim. The ALJ then addressed the second claim, which sought compensation for petitioner's disability after the second injury. *Id.* at A44-A59. The ALJ awarded petitioner compensation for temporary total disability from May 1992 to December 1995, permanent total disability from December 1995 until petitioner became self-employed in August 1997, and permanent partial disability thereafter.[3] *Id.* at A61-A62.

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[3] The ALJ awarded petitioner attorney's fees for work performed before him in the amount of $21,800, plus expenses, after reducing the fee request by 25% to reflect petitioner's limited success. Pet. App. A70 n.1. That award is not at issue in this proceeding, although petitioner appealed the failure to award full fees to the Benefits Review Board. *Ibid.*

Petitioner filed a motion for reconsideration, seeking clarification of whether his two claims had been consolidated as a single cause of action and requesting a de minimis benefits award for his 1987 injury. Pet. App. A63-A64; see *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121 (1997) (discussing nominal compensation awards). The ALJ denied the motion, stating that the claims had been consolidated for purposes of the hearing and that although the second claim arose out of an aggravation of the original injury, the claims were not a single cause of action and "represented two separate and distinct injuries." Pet. App. A64. As for a de minimis or nominal award for the 1987 claim, the ALJ concluded that the rationale for such awards—to keep open the window of opportunity to file for modification of an award under 33 U.S.C. 922 if "future events or circumstances change a potential disability into an actual one"—was inapplicable in this case because the window for filing a modification request remained open based on the ongoing compensation award on the second claim. Pet. App. A64-A66.

5. Petitioner thereupon filed applications for fee awards under Section 28 of the LHWCA, 33 U.S.C. 928, with both the Benefits Review Board and the court of appeals, seeking fees for his attorney's work before each body for the proceedings reviewing the first ALJ decision on his claim relating to the 1987 injury. Pet. App. A6. See also 20 C.F.R. 702.132(a) (application for attorney's fees shall be made to decision-maker before whom services were performed).

The Benefits Review Board denied the fee petition on the ground that petitioner had not been successful in those review proceedings. App., *infra*, 2a. The Board then denied petitioner's motion for reconsideration. Pet. App. A68-A72. The Board rejected petitioner's

argument that under *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), he was entitled to fees because the 1987 injury was "interrelated" with the 1992 injury on which his second claim was based. Pet. App. A70. The Board noted that the fact

> that [petitioner's] present loss in wage-earning capacity [(*i.e.*, that which occurred after the 1992 injury)] is due to both the 1987 and 1992 injuries does not make [petitioner] successful for the period of time prior to the second injury, which is the only period of time in question for the attorney services performed before the Board.

*Id.* at A71. The Board further noted that "although *Hensley* permits a fee for interrelated claims, the claims here clearly [were] severable as the [attorney's] work performed before the Board represents time expended prior to the 1992 injury." *Ibid.*[4]

The court of appeals, without opinion, denied petitioner's application for fees for representation before that court. Pet. App. A1. Petitioner's motion for panel reconsideration was then denied without opinion by order of July 13, 1999. *Id.* at A2. On July 26, 1999, petitioner sought to file a petition for rehearing en banc, which the clerk's office refused to accept because the pleading addressed a non-dispositive order. Pet. 8. When petitioner filed a motion for leave to file the petition for rehearing en banc, the court of appeals denied leave to file, treating the petition as one seeking

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[4] Petitioner petitioned for review of the Board's decision on August 24, 1999. Pet. 2. The court of appeals dismissed that petition, No. 99-60567, as frivolous on December 2, 1999. Pet. App. A4-A5.

en banc review of the July 13 order denying reconsideration. Pet. App. A3.

**ARGUMENT**

The court of appeals correctly denied petitioner's applications for attorney's fees, and that denial does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted. The order of the court of appeals denying petitioner leave to file a petition for rehearing en banc also presents no circuit conflict and does not warrant review by this Court.

1. Under Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928, a claimant is entitled to an award of a reasonable attorney's fee for successful prosecution of a claim, including success in review proceedings before the Benefits Review Board or court of appeals. Thus, Section 28(a) of the LHWCA provides that where an employer or insurance carrier declines to pay any compensation after receiving written notice of a claim, and the claimant thereafter "utilize[s] the services of an attorney at law in the successful prosecution of his claim," the deputy commissioner, ALJ, Benefits Review Board, or court, as the case may be, shall award a "reasonable attorney's fee" against the employer or carrier. 33 U.S.C. 928(a). Section 28(b) further provides that where an employer or carrier pays or tenders compensation without an award, but a claimant utilizes an attorney to obtain compensation that "is greater than the amount paid or tendered," then the claimant shall be awarded a reasonable attorney's fee "based solely upon the difference between the amount[s] awarded and * * * tendered." 33 U.S.C. 928(b). Section 28(b) provides as well that "[i]f the claimant is successful in

review proceedings before the [Benefits Review] Board or court in any such case an award may be made * * * against the employer or carrier for a reasonable attorney's fee." *Ibid.* See also 20 C.F.R. 702.134. An attorney may not receive a fee from a claimant unless the fee has been approved by the deputy commissioner, ALJ, Board, or court. 33 U.S.C. 928(e); 20 C.F.R. 702.133.

Section 28's legislative history makes clear that "[a]ttorney[']s fees may only be awarded against the employer where the claimant succeeds, and the fees awarded are to be based on the amount by which the compensation payable is increased as a result of the litigation." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 9 (1972); see also *Director, OWCP* v. *Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991) ("Attorney[']s fees may be recovered [under Section 28] only if the claimant receives increased compensation or other benefit from the action.").

By this measure, the court of appeals' decision to deny petitioner an award of fees for his counsel's work during unsuccessful proceedings before the Board and the court of appeals related to the claim for the 1987 injury is manifestly correct. Petitioner's appeal from the ALJ's first decision sought additional compensation beyond that awarded by the ALJ for petitioner's disability resulting from the 1987 injury. The court of appeals, however, rejected petitioner's argument that the job that he had been provided after his injury was not suitable alternative employment, and the court remanded for a determination of whether his earnings from that job represented his actual wage-earning capacity. While the remand kept petitioner's claim for additional compensation alive, on remand the ALJ ruled against him. Consequently, because petitioner

was not successful in obtaining any additional compensation through resort to the review proceedings, he was not entitled to an award of fees. Pet. App. A1, A71-A72; cf. *Clark* v. *City of L.A.*, 803 F.2d 987, 993 (9th Cir. 1986) (prevailing civil rights plaintiffs' request for their attorneys' fees in pursuit of unsuccessful appeal was appropriately denied where plaintiffs' success derived solely from the trial court ruling and not from appeal).

Petitioner contends (Pet. 16-18) that the denial of fees in this case conflicts with this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), because the review proceedings here involved a claim that was "intertwined" with his subsequently successful claim based on the 1992 injury. Under *Hensley*, the fee award of a prevailing party (*i.e.*, one who has prevailed on a significant issue that achieves some of the benefit sought by bringing suit) should be based on attorney time devoted to successful claims, not attorney time expended on unrelated, unsuccessful claims. *Id.* at 434-435. In some instances, claims for relief may share a "common core of facts or * * * be based on related legal theories," and "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 435. In those instances, the inquiry should focus on the degree of success obtained and the reasonableness of counsel's expenditure of time in relation to the results achieved. *Id.* at 436.

The Board and the court of appeals fully comported with *Hensley* in concluding that the claim pertaining to petitioner's disability resulting from his 1987 injury alone was separate from the claim regarding his later disability resulting from the combined effects of the

1992 and 1987 injuries.[5] The 1992 injury had not yet occurred at the time of the ALJ hearing and decision on the first claim. Thus, neither the facts nor any legal theories of recovery pertaining to the 1992 injury were presented in the first ALJ proceeding or on review by the Board and the court of appeals in that proceeding. Rather, petitioner filed a separate claim with respect to the 1992 injury, while the claim on the 1987 injury was pending before the Fifth Circuit. The ALJ later adjudicated the remanded issue in the same proceeding as the new claim based on the 1992 injury. Pet. App. A40. Thus, in marked contrast to the concern in *Hensley* that counsel's time spent on related claims in a single lawsuit may not always reasonably be divided between successful and unsuccessful claims, petitioner's attorney's work in the unsuccessful review proceedings concerning the 1987 injury claim can easily be separated from his work on the successful claim for the 1992 injury. See *id.* at A64 (ALJ's ruling that the two claims had been consolidated for hearing purposes but "represented two separate and distinct injuries," not "a single cause of action").

In any event, even if the two claims at issue here were deemed to be "related" claims within the meaning of *Hensley*, it would be appropriate to reduce petitioner's fee award in light of his limited overall success in the proceedings. Petitioner sought, but did not obtain, compensation for disability for the period

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[5] Although *Hensley* interpreted a statute providing for attorney's fee awards for prevailing civil rights plaintiffs, the decision's principles are generally applicable to Section 28 of the LHWCA. See *George Hyman Constr. Co.* v. *Brooks*, 963 F.2d 1532, 1536 (D.C. Cir. 1992); *General Dynamics Corp.* v. *Horrigan*, 848 F.2d 321, 325 (1st Cir.), cert. denied, 488 U.S. 992 (1988).

between his assignment to a modified joiner position in October 1990 and the 1992 injury. Denying fees for the review proceedings before the Board and court of appeals—proceedings that were devoted solely to seeking to obtain such relief and did nothing to further his success on the second claim—is a reasonable method of tailoring the fee award to petitioner's level of success. *Hensley*, 461 U.S. at 436-437 (within its discretion to make equitable judgments, a "court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success" in order to ensure that the fee award bears a reasonable relationship to the level of success obtained).

2. Petitioner contends (Pet. 18-22) that review is warranted because the court of appeals' decision denying him an award of fees constitutes an impermissible interference with his right to counsel in derogation of the due process and equal protection guarantees of the Fifth Amendment. Petitioner relies (Pet. 21) on *United States Department of Labor* v. *Triplett*, 494 U.S. 715 (1990), in which the Court considered but rejected a constitutional challenge to a statutory requirement that a payment of attorney's fees by the claimant must be approved by the Board. Nothing in *Triplett* suggests that the Constitution might require the payment of attorney's fees by the claimant's opponent. That fee-shifting requirement is entirely a creature of statute. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975). Moreover, even in the *Triplett* situation, a party, in order to prevail on a constitutional challenge, must overcome a "heavy presumption of [the statute's] constitutionality" by showing that claimants cannot obtain representation and that this unavail-

ability is attributable to the government's fee regime. *Triplett*, 494 U.S. at 721.

Petitioner makes no effort to make the requisite showing under *Triplett*. Nor could petitioner make that showing because he has been represented by counsel throughout these proceedings and, indeed, has received a substantial attorney's fee award pursuant to Section 28 of the LHWCA to reflect his success in proceedings before the ALJ on his claims. See note 3, *supra*. Thus, no constitutional right to the ability to retain counsel has been impaired in this case.

Petitioner's contention (Pet. 19) that, if LHWCA claimants "cannot be assured of payment for successfully prosecuting irrevocably intertwined claims, injured workers may discover that they are no longer able to obtain adequate representation," is not supported by the facts of this case. The court of appeals denied a fee award for attorney representation in review proceedings that were unsuccessful; petitioner received a fee award for his attorney's work in those proceedings that were successful. Petitioner presents no ground to question that the award for successful claims, envisioned by Congress and accomplished in this case, in any way impinges on the right to counsel. Thus, petitioner's constitutional argument does not warrant review by this Court.

3. Petitioner also argues (Pet. 22-24) that this Court should review the court of appeals' denial of his motion to file a petition for rehearing en banc. The court of appeals did not articulate the basis for its ruling, but, on its face, the order treated the petition for rehearing en banc as challenging the panel's July 13, 1999 order denying panel reconsideration, rather than the underlying June 11, 1999 order denying fees. Pet. App. A3. Thus, the petition was viewed as relating only to a non-

dispositive ruling by the panel.[6] See Pet. 8 (Fifth Circuit clerk refused to accept the petition on the ground that it challenged a ruling on a non-dispositive motion). Since the order is silent as to the rationale for the denial, the court of appeals, contrary to petitioner's suggestion (Pet. 24), certainly did not hold that decisions on attorney's fee awards are outside the scope of Federal Rule of Appellate Procedure 35, which governs en banc determinations. In any event, the denial of attorney's fees in this case presents no issue that meets the stringent criteria for en banc review, see Rule 35(a) and (b), and any error by the court of appeals in denying petitioner leave to file a petition for en banc review was therefore harmless. Accordingly, this case presents no issue regarding the construction of Rule 35 that warrants this Court's review.

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[6] Because petitioner apparently tendered the petition on July 26, 1999, Pet. 8, within 45 days of the Court's June 11, 1999 order denying fees, it seems that his petition would have been timely under the Federal Rules of Appellate Procedure for seeking review of that order, had the petition sought such review. See Fed. R. App. P. 35(c), 40(a) (45-day period applies where federal agency is a party).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000

**APPENDIX**

**U.S. Department of Labor** [Seal Omitted]

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

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BRB No. 92-1547
Case No. 91-LHC-0049
OWCP No. 6-110624

RENE M. DARBY, CLAIMANT-PETITIONER

v.

INGALLS SHIPBUILDING, INCORPORATED,
SELF-INSURED EMPLOYER-RESPONDENT

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[Filed: May 24, 1999]

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**ORDER**

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Claimant's counsel has filed a complete, itemized statement, requesting a fee for legal services performed in the captioned appeal, pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $14,984.38 for 85.625 hours of legal services at an hourly rate of $175.00. Counsel also requests $84.96 in expenses. Employer has filed objections to the fee petition and claimant filed a reply to employer's objections.

Employer asserts, initially, that the fee petition is untimely. As a basis for this objection, employer

alleges that counsel should have submitted the fee petition within a reasonable time following the final decision in this case. Alternatively, employer asserts that any fee approved should be awarded at an hourly rate reduced to reflect claimant's limited success. Employer also objects to a request for an enhanced fee and to any time and expenses incurred prior to the filing of the appeal in this case.

Section 802.203 of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.203, provides that a fee petition may be filed within sixty (60) days of the issuance of a decision or non-interlocutory order by the Board. The Board, however, has discretion to accept a fee petition filed outside that time period. We note employer's objection to counsel's delay in filing his fee application but deny the request to strike the fee petition solely upon the basis of its filing date.

Upon review, the Board has determined that claimant did not successfully pursue his claim in this case. Accordingly, counsel is not entitled to a fee for services performed before the Board in this appeal and we deny the application for attorney fees. 33 U.S.C. §928; 20 C.F.R. §802.203.

/s/ BETTY JEAN HALL
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ JAMES F. BROWN
JAMES F. BROWN
Administrative Appeals Judge

/s/ REGINA C. MCGRANERY
REGINA C. MCGRANERY
Administrative Appeals Judge

**CERTIFICATE OF SERVICE**

92-1547 Rene M. Darby v. Ingalls Shipbuilding, Inc. (Case No. 91-LHCA-0049) (OWCP No. 06-0110624)

I certify that the parties below were served this day.

May 24, 1999 (DATE) /s/ THOMAS O. SHEPHERD, JR.
THOMAS O. SHEPHERD, JR.
Clerk of the Board

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